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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940.

No. 532.

CARL F. KORTEPETER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

No. 533.

GURNEY G. DERBYSHIRE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

With Supporting Brief.

PAUL Y. DAVIS,
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SUBJECT INDEX

	Page
Table of Authorities	ii
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	2-5
Jurisdictional Statement	6
Questions Presented	6-7
Reasons Relied on for Allowance of Writ	7-9
Prayer for Writ	9-10
Brief in Support of Petition for Writ of Certiorari	11
The Opinion of the Court Below	11
Jurisdiction to Review the Judgment	12
Statement of the Case	12
Summary of Argument	15-17
Argument	18-29
Appendix of Statutes Involved	30-32

ALPHABETICAL LIST OF AUTHORITIES

Cases

Page

Burrows & Kenyon Inc. v. Warren (C. C. A. 1, 1925), 9 F. 2d 1 ..... 8, 15, 18, 20

Equitable Life Assurance Society of the United States v. Wells (C. C. A. 6, 1939), 101 F. 2d 608 ..... 8, 15, 18

Hamilton v. Liverpool, London and Globe Insurance Co. (1890), 136 U. S. 242 ..... 8, 15, 18, 20

Landen v. United States (C. C. A. 6, 1924), 299 Fed. 75 ..... 9, 16, 26

McKnight v. U. S. (C. C. A. 9, 1935), 78 F. 2d 931 ..... 8, 16, 18

Morrison v. California (1934), 291 U. S. 82 ..... 9, 16, 17, 25, 27-28

Pettibone v. United States (1893), 148 U. S. 197, 206-207 ..... 9, 15, 24, 26

Schloss Bros. & Co. v. Charles Stern Co. (C. C. A. 5, 1929), 36 F. 2d 628 ..... 8, 15, 18

Union State Bank & Trust Co. v. Northwestern Life Ins. Co. (C. C. A. 5, 1932), 55 F. 2d 1070 ..... 8, 15, 18

United States v. Dennett (C. C. A. 2, 1930), 39 F. 2d) 564, 76 A. L. R. 1092 ..... 8, 16, 18

United States v. White Oak Coal Co. (C. C. A. 4, 1925), 5 F. 2d 439 ..... 8, 16, 18

Statutes

Section 12 of the Emergency Relief Appropriation Act of 1937, 52 Stat. 817 7

Page

Section 19 of the Emergency Relief Appropriation Act of 1937, 52 Stat. 809 7

Section 37 of the Criminal Code, 35 Stat. 1096 .....

Section 723a of 48 Stat. 926, 18 U. S. C. A. 6, 12

Section 1, Chapter 88 of the Indiana Acts of 1931, p. 254 .....6, 12

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PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Your Petitioners, Carl F. Kortepeter and Gurney G. Derbyshire each respectfully present that:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition seeks review of the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered July 22, 1940, (R.* 220-227), rehearing denied September 24, 1940, (R. 229), affirming judgments of conviction rendered against petitioners by the District Court of the United States for the Southern District of Indiana. The opinion is not yet reported.

Counts I and II of the indictment (R. 1-2) charged diversion of W. P. A. funds and labor in violation of § 12 of the Emergency Relief Appropriation Act of 1937, 52 Stat. 817, and § 19 of the Emergency Relief Appropriation Act of 1938, 52 Stat. 809. Count III charged (R. 3-13) conspiracy to defraud the United States (Criminal Code § 37, 35 Stat. 1096) by diversion of W. P. A. funds and labor. Sentences of eighteen months and one year and one day (R. 158-159) are necessarily referable to Count III, maximum penalty under the other counts being one year.

By motion for directed verdict petitioners each challenged the sufficiency of the evidence (R. 84-86), and the overruling of this motion was assigned as error by each. (R. 200, 204.)

The planned enterprise constituting the gist of the alleged conspiracy was the use of W. P. A. funds and labor, allotted under "blanket" projects for use on unspecified county highways, to build roads through suburban subdivision property owned by petitioner Derbyshire, Korte-

* The record consists of two volumes, one printed in the court below, and one volume of exhibits, not printed. The printed volume is referred to as R., the second unprinted volume as II. R.

peter's father-in-law, upon rights of way dedicated as public highways by Derbyshire and accepted as such by the Board of Commissioners of Marion County.

Evidence as to the above facts was undisputed and was so treated by the Circuit Court of Appeals. (R. 221.)

Three "project proposals" executed by the Board of Commissioners of Marion County, three project applications, executed by the local W. P. A. office, three Presidential letters allotting funds, and various rules, regulations and bulletins of the W. P. A. were alleged in the indictment to have made this use of the funds illegal. (R. 9.)

Motions for directed verdict having been overruled (R. 133), the trial court authorized the jury to find that the acts done would constitute a diversion of funds if the highways, though properly dedicated, were "without the scope of the roads or highways which could have been improved under authority of the letter of the President . . . and bulletins issued by the proper authorities." (R. 95.)

Thus, although there was no dispute as to what defendants had done or agreed to do and the *facts* surrounding the use of the funds were undisputed, so that under the Government's theory the legality of the use depended upon a construction of written documents, the jury were not only left to determine this question of construction, but the Circuit Court of Appeals also refused to determine it, treating the jury verdict as conclusive, as follows:

> "*Sufficiency of the evidence.* Appellants earnestly insist that all their acts were legitimate and permissible under the law; that the roads constructed were within the purview of authorized works.

> We are satisfied that the evidence was such as to require this question to be submitted to the jury. The most that can be said of the evidence is that a jury might, if it accepted defendants' version, have found them not guilty." (R. 221-222.)

As will be pointed out in the brief in greater detail, the Court, in so doing, considered only those portions of the writings supporting the jury's verdict, and ignored other portions tending to an opposite conclusion.

Thus three Presidential letters authorizing the expenditure are referred to in the indictment. The Court in its opinion (R. 223) refers only to one of these which was Government's Exhibit 4 (II R. 175, R. 20), makes from this an "inescapable" deduction that the project concerned only existing roads, and wholly ignores the original Presidential authorization "To construct . . . highways, roads and streets . . . upon property where the necessary leases or easements will be or have been obtained." (Defts.' Ex. E, II R. 319, R. 77.) From this there is an equally "inescapable" deduction that *new* construction was authorized. That the latter was not wholly irrelevant is evidenced by the fact that the two other Presidential letters were issued on applications which were respectively a "supplement" (Defts.' Ex. F, II R. 321, R. 77) and a "continuation" (Gov. Ex. 3, II R. 170, 172, R. 19) of the original project authorized by the original Presidential letter.

There was no evidence that petitioner Derbyshire had knowledge of any of the terms or limitations of any of the proposals, applications, Presidential letters, rules or regulations, which the Circuit Court of Appeals treated as determinative of the "purview of authorized works" except evidence that Kortepeter advised him that he would first

have to dedicate the streets to the county. (R. 52, 68.) Derbyshire complied with the requirement for dedication. (Ex. A, II R. 304, R. 27, Ex. B, II R. 305, R. 53.) Notwithstanding the total absence of evidence to show that Derbyshire had any knowledge that the proposed use of funds was illegal, the Circuit Court of Appeals has found evidence sufficient to support his conviction of conspiring with intent to defraud, saying:

> "Defendants must have known or at least had good reason to question the legality of a work, the entire benefit of which was to enure to the owner of a tract of land not yet subdivided." (R. 223.)
>
> "We are also convinced that in the absence of express authorization, it must have been apparent to both defendants, that the expenditure of money and labor for private gain, such as here disclosed, was illegal." (R. 224.)

Finally the record is barren of any evidence of concealment, chicanery, trickery, or misrepresentation. Whatever Kortepeter and Derbyshire did was done openly, in the public view, without any badge of fraud. Kortepeter ordered the work to be done (R. 33) and disbursements to pay for it were made by the Disbursing Clerk to the foremen (R. 46) upon authority of reports of supervising timekeepers. (R. 21.) There is no evidence that any of these persons was in any way misled or deceived.